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Please accept my strong OPPOSITION to the proposed new rule, both overly broad and unnecessary, which was crafted to negate *Sanchez*. I am a former civil rights attorney who had represented clients in cases involving civil rights in federal court as well as administrative proceedings, including a case to secure access to rehabilitation health care services through the State of Arizona where not only did I prevail, but I was awarded attorney's fees against the State of Arizona something rarely accomplished. While I now longer practice law as an attorney I currently am a plaintiff representing myself in a wrongful death case with limited funds and am dependent upon the testimony of a treating physician, since expert witness fees are prohibitive. As both a former civil rights attorney and current personal injury litigant with limited funds, I believe I provide a unique perspective on the proposed rule to overturn *Sanchez*. Because of both my civil rights legal background and current immersion in an all-encompassing personal injury, I applaud *Sanchez* not only for the equal treatment it mandates regarding treating physicians, a class of percipient fact witnesses, but also for recognition of the artificial barriers to justice that unnecessary costs create. I have long been aware of the importance of the dual concerns of the *Sanchez* court, both equal treatment of the similarly-situated as well as the facilitation of access to the courts, which I understand to be a primary mandate of the Arizona Supreme Court as well public policy. I believe it is imperative that the Arizona Supreme Court prevent the co-option of *Sanchez* by the proposed ill-conceived new rule.

The proposed rule requiring expert deposition fees be paid to treating physicians despite *Sanchez*, along with the disappointing support from members of the plaintiff's bar, merely play to unwarranted fears of wholesale abuse by defendants and their deep-pocket insurance companies that can readily be addressed by a trial court within the existing framework of discovery sanctions, and its inherent ability to make a determination under the facts and the law as to the true status of a witness, as well as to abuses of the discovery process that warrant payment of expert witness fees in whole or in part and monetary sanctions for discovery abuses, if appropriate.

Further, a litany of possible unintended consequences of the well-crafted and legally supported *Sanchez*' mandate to pay treating physicians the same deposition witness fee as other percipient/fact witnesses is both without verifiable facts of an actual case or controversy before a trial or appellate court and lack the judicial scrutiny at both the trial court and appellate level, much less review by this Arizona Supreme Court. The *Sanchez* court and the public deserve better than that. For example according to proponents of the new rule, a purported unintended consequence of *Sanchez* would be a reduction in access to medical care to personal injury victims. In the era of Medicare, Medicare Advantage and Obama Care as well as Accountable Care and the proliferation of "Medical Homes" as a new medical care template, as well as the proliferation of free standing urgent care units and expanding ED/walk in units at hospitals, along with expanded rehab centers, physical therapy practices and chiropractic services all competing for patients, this is simply not a credible concern, even if it were the domain of the Arizona Supreme Court to sacrifice equal protection principles and access to justice to a speculative reduction of access to medical treatment. Additionally, many personal injuries are the result of medical malpractice, or wrongful death where the treating physicians were already treating prior to or at the time of the injury and in any event, the victim, before or after the event, likely already had his or health care in place. In addition, the proponents of a new rule subscribe to another highly questionable premise, that lack of payment of an expert witness fee will taint the testimony of a treating physician at his or her deposition or at trial or at best alienate him or her. This premise is as insulting to a treating physician as it would be to a teacher who is called in as a

witness in an education rehabilitation lawsuit or supervisor in an employment discrimination lawsuit. Possible testimony at a deposition comes with the territory of many professions and the integrity of the individual questioned at the deposition or at trial is not dependent (or so we must assume) upon the payment of a deposition expert witness fee, any more so than payment of a fee to retain an expert witness necessarily taints that expert witnesses' deposition or testimony at trial. The adversary system, by its nature, does the best it can within its limitations, to protect its core values, two of which are ably upheld in *Sanchez*. Nor is a doctor or medical group, or health plan, (particularly if there is already a doctor-patient relationship with the patient) likely to refuse treatment, even if they could, under its health plan, or under the law, (which for example expressly prohibits rejection by an ER doctor); further ANY doctor in a hospital would be unlikely to reject a patient even outside the parameters of the ED, in observation status or upon admission or even at discharge to a rehab facility or nursing home etc. etc. if it wants to remain on important lists. Quite simply, the proponents of a new rule overturning *Sanchez* seem unaware of the chancing face of access to medical care, irrespective of personal injury and possible, or existing litigation.

Further, the Court of Appeals in *Sanchez* merely confirmed the parameters of when a treating physician is a fact witness like any other professional as opposed to when the witness is a true, even "morphed" / hybrid expert witness. In doing so, *Sanchez* was in accord with the 9th Circuit Opinion written by the Judge Barry G. Silverman, in *Goodman v. Staples The Office Superstore, LLC* 644 F.3d 817 (2011). In the *Goodman* case, one of first impression, the 9th circuit reviewed criteria of a treating physician / fact witness and determined that the doctor's extensive contact with counsel during litigation (where he reviewed additional documents provided by counsel) negated treating physician witness status (in that case, resulting in heightened disclosure requirement). Similarly, even under *Sanchez*, as it now stands without any new rule, if a violation of appropriate deposition expert fees is found during a deposition or after a transcript is submitted to the court by a party after certification that the discovery dispute could not be resolved without court intervention, the trial court could then rule on both the propriety of expert witness fees as well as any appropriate sanctions. Nothing in *Sanchez* forecloses expert witness deposition fees from being accessed or even sanctions for discovery abuses where appropriate.

It should be noted that if already existing Rules of discovery and sanctions do not curtail real, verifiable abuses (as opposed to speculation) then, in accordance with a rational relationship to protecting the dual concerns of the *Sanchez* court, (equal treatment of all professionals who are fact witnesses as well as curtailing unnecessary costs of the parties to allow access to the courts) an appropriately narrow new Rule, or Court practice may be devised, such as presumptively limiting the length of treating physician witness who are not designated as expert witnesses to depositions of two hours or even less, considering prior access to appropriate medical records relevant to that treating physician. Further, as a last resort, Arizona Rule 706, permits the trial court to appoint its own expert witnesses, and assess costs to the parties, presumably including a treating physician not designated by either party as an expert witness. While Arizona Rule 706 has still not been fully conformed to its federal counterpart, and its potential is apparently untested by trial courts, as an already existing rule it has much potential to de-fuse possible irreconcilable differences in regard to the expert witness or fact witness status of a treating physician, a possible sword in the hand of the trial court, if not a shield.

In any event, there is no reason whatsoever at this stage to co-opt the important and well supported legal principles of *Sanchez* on the basis of unsupported hypothetical abuses that the Courts are already well equipped to handle on a case by case basis. If someday in the future, the Court of Appeals revisits, narrows or expands the issues of *Sanchez*, by a careful analysis of the facts and the applicable law, this Arizona Supreme Court may then wish to review the appellate court's holdings by careful consideration of a Petition for Review or sua sponte review, and well developed legal briefs and incisive questions at oral argument. Under that time, or a less broad new rule is

proposed that sufficiently protects the legitimate dual concerns of the Court of Appeals, *Sanchez* should remain in place and the proposed new Rule rejected.